

**United States Department of Labor  
Employees' Compensation Appeals Board**

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E.C., Appellant )

and )

**DEPARTMENT OF JUSTICE, FEDERAL  
BUREAU OF PRISONS, FEDERAL  
CORRECTIONAL INSTITUTION,  
Memphis, TN, Employer** )

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**Docket No. 15-560  
Issued: May 1, 2015**

*Appearances:*  
*Appellant, pro se*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

CHRISTOPHER J. GODFREY, Chief Judge  
ALEC J. KOROMILAS, Alternate Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On January 21, 2015 appellant filed a timely appeal from the Office of Workers' Compensation Programs (OWCP) August 13, 2014 merit decision and September 11, 2014 nonmerit decision. Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

**ISSUES**

The issues are: (1) whether appellant sustained a neck injury on November 13, 2013 while in the performance of duty, as alleged; and (2) whether OWCP properly denied her request for further merit review of her claim pursuant to 5 U.S.C § 8128(a).

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

On appeal, appellant contends that she provided all elements of her claim. The additional statements from her physicians provide the requested factual information, but were not noted by OWCP. Appellant provided a consistent history of her work-related neck injury.

### **FACTUAL HISTORY**

On November 19, 2013 appellant, then a 44-year-old case manager, filed a traumatic injury claim alleging that on November 13, 2013 she sustained neck and back injuries when an associate warden pointed down at her shoes and she bent down to take a yellow sticky note off the bottom of her left shoe. She stopped work on November 19, 2013.

In a November 18, 2013 note, Heather Taylor, a family nurse practitioner, released appellant to return to work on December 13, 2013.

In a December 17, 2013 work capacity evaluation (Form OWCP-5c), Dr. Philip G. Mintz, an attending Board-certified family practitioner, diagnosed neck sprain. He advised that appellant could return to work eight hours a day with a lifting restriction.

An unsigned workers' compensation status form report from Campbell Clinic dated December 19, 2013 provided a diagnosis of cervicgia and stated that appellant could perform sedentary work. An order sheet dated December 19, 2013 from the same clinic contained an illegible signature and stated that she had cervicgia proximal, and a cervical disc.

In a December 24, 2013 letter, OWCP noted that when the initial claim was received, it appeared to be a minor injury that resulted in minimal or no lost time from work and, since the employing establishment did not controvert continuation of pay or challenge the case, a limited amount of medical expenses were administratively approved and paid. However, the merits of the claim had not been formally considered. OWCP reopened appellant's claim because she had not returned to work in a full-time capacity. Appellant was requested to submit additional factual and medical information, including a physician's opinion supported by a medical explanation as to how the reported work incident caused or aggravated the claimed medical condition.

On December 30, 2013 appellant described the November 13, 2013 incident. Following a meeting with the warden, an associate warden, motioned to her to pick something up.<sup>2</sup> As appellant bent down to remove a yellow sticky note from her left shoe, the warden asked her a question. She felt a pull in her back and when she looked up to answer his question she felt a shooting pain in her neck to the back of her head. Appellant described the immediate effects of her injury. She had not experienced a previous injury or any other injury on November 13, 2013. Appellant immediately reported the injury to her supervisor, and sought medical treatment.

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<sup>2</sup> On December 16, 2013 appellant filed an occupational disease claim under OWCP File No. xxxxxx698 alleging that she sustained post-traumatic stress disorder, headaches, anxiety, and neck pain as a result of a meeting with the warden. In a December 24, 2013 decision, OWCP denied her claim.

In a December 16, 2013 workers' compensation form, Dr. Mintz provided a history of the November 13, 2013 alleged incident. He diagnosed cervical myositis and advised that appellant could return to modified work with a lifting restriction on December 16, 2013.

In a December 19, 2013 medical report, Dr. Nahum M. Beard, an attending Board-certified family practitioner, provided a history of the November 13, 2013 incident and appellant's medical treatment. He listed findings on physical and x-ray examination and diagnosed cervicothoracic junction pain that had been persistent despite physician-supervised therapy, anti-inflammatories, and muscle relaxers.

An unsigned workers' compensation status form report dated December 19, 2013 from Campbell Clinic provided a diagnosis of myofascial dysfunction and stated that appellant could return to sedentary work.

In a January 27, 2014 decision, OWCP denied appellant's traumatic injury claim. It found that the evidence was sufficient to establish that the November 13, 2013 incident occurred as alleged, but the medical evidence did not provide a rationalized medical opinion establishing that the accepted work incident caused, contributed to, or aggravated the claimed neck condition.

On February 25, 2014 appellant requested a review of the written record by an OWCP hearing representative.

In an addendum report dated February 5, 2014, Dr. Beard stated that it was clear that appellant sustained a work-related injury caused by the November 13, 2013 employment incident. He noted her persistent pain which caused ongoing discomfort despite initial medical treatment. Based on x-rays and his clinical evaluation, Dr. Beard advised that appellant had significant cervicothoracic junction tenderness and myofascial dysfunction. He stated that there was no evidence of a previous injury or underlying condition that could contribute to her conditions. Dr. Beard planned to clarify appellant's diagnosis with further testing because he felt a concern that the myofascial pain and persistent dysfunction were seen around the muscles and joints of the cervical spine. He wanted to identify an underlying cause for the pain such as facet dysfunction or disc disease not appreciable on basic x-rays and physical examination. On February 25, 2014 Dr. Beard reported that appellant was seen on December 19, 2013 for cervicalgia and a proximal cervical disc which was directly related to the November 13, 2013 employment incident. He opined that when she looked up at a supervisor while still bent over at the waist, the muscles, and disc of the neck were stressed. Dr. Beard stated that further evaluation with magnetic resonance imaging (MRI) scan demonstrated a large disc herniation that required ongoing treatment and possibly surgery. He concluded that this condition was work related and not a preexisting condition.

In a February 7, 2014 report, Dr. Mintz related that appellant was seen on November 18, 2013 for cervical myositis and sprain which was directly related to the November 13, 2013 employment incident. He opined that when she looked up at a supervisor while still bent over at the waist the muscles in the neck were overly stressed and caused the cervical myositis and strain.

An unsigned clinical summary dated February 21, 2014 stated that appellant had cervicalgia.

In an August 13, 2014 decision, an OWCP hearing representative affirmed the January 27, 2014 decision. She found that the medical evidence of record did not provide a rationalized medical opinion based on an accurate factual background to establish a causal relation between the diagnosed cervical conditions and the accepted November 13, 2013 employment incident.

By letter dated August 25, 2014, appellant requested reconsideration and cited cases from the New Hampshire's appellate court for the propositions that the medical evidence of record established that her medical treatment was required as a result of a work-related injury. She argued that the consistent history of injury she provided certified her claim, and that the employing establishment was obligated to pay her medical expenses.

In a September 11, 2014 decision, OWCP denied merit review of appellant's claim. It found that her request for reconsideration neither raised substantive legal questions nor included new and relevant evidence. OWCP determined that the decisions from the New Hampshire's appellate state court cited in appellant's reconsideration request had no bearing on her federal claim.

### **LEGAL PRECEDENT -- ISSUE 1**

An employee seeking benefits under FECA<sup>3</sup> has the burden of proof to establish the essential elements of his or her claim by the weight of the reliable, probative, and substantial evidence<sup>4</sup> including that he or she sustained an injury in the performance of duty and that any specific condition or disability for work for which he or she claims compensation is causally related to that employment injury.<sup>5</sup>

To determine whether a federal employee has sustained a traumatic injury in the performance of duty, it first must be determined whether fact of injury has been established.<sup>6</sup> There are two components involved in establishing the fact of injury. First, the employee must submit sufficient evidence to establish that he or she actually experienced the employment incident at the time, place, and in the manner alleged.<sup>7</sup>

The second component is whether the employment incident caused a personal injury and generally can be established only by medical evidence.<sup>8</sup> The evidence required to establish

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<sup>3</sup> 5 U.S.C. §§ 8101-8193.

<sup>4</sup> *J.P.*, 59 ECAB 178 (2007); *Joseph M. Whelan*, 20 ECAB 55, 58 (1968).

<sup>5</sup> *G.T.*, 59 ECAB 447 (2008); *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

<sup>6</sup> *S.P.*, 59 ECAB 184 (2007); *Alvin V. Gadd*, 57 ECAB 172 (2005).

<sup>7</sup> *Bonnie A. Contreras*, 57 ECAB 364 (2006); *Edward C. Lawrence*, 19 ECAB 442 (1968).

<sup>8</sup> *John J. Carlone*, 41 ECAB 354 (1989); see 5 U.S.C. § 8101(5) (injury defined); 20 C.F.R. §§ 10.5(ee), 10.5(q) (traumatic injury and occupational disease defined, respectively).

causal relationship is rationalized medical opinion evidence, based upon complete factual and medical background, showing a causal relationship between the claimed condition and the identified factors.<sup>9</sup> The belief of the claimant that a condition was caused or aggravated by the employment is insufficient to establish a causal relationship.<sup>10</sup>

### **ANALYSIS -- ISSUE 1**

OWCP accepted that on November 13, 2013 appellant bent over to remove a sticky note from her shoe while in the performance of duty. It found that the medical evidence failed to establish that she sustained a neck injury as a result of the accepted incident. The Board finds that appellant has failed to provide medical evidence to establish that she suffered a neck injury causally related to the employment incident.

Dr. Mintz's February 7, 2014 report found that appellant had cervical myositis and strain causally related to the November 13, 2013 employment incident. He stated that when she looked up at her supervisor while bent over at the waist, the muscles in her neck became overly stressed and caused her cervical myositis and strain. While Dr. Mintz addressed a causal relationship between appellant's neck conditions and the accepted work incident, he did not provide adequate rationale explaining how bending over and looking up at the same time would cause or contribute to cervical myositis and strain. His general statement that her neck muscles became overly stressed is not rationalized.<sup>11</sup> Dr. Mintz other reports addressed appellant's neck conditions, but do not provide an opinion on whether these conditions were caused or contributed to the accepted employment incident.<sup>12</sup> The Board finds that his reports are of diminished probative value and insufficient to meet appellant's burden of proof.

Similarly, Dr. Beard's reports do not establish appellant's claim. In a February 25, 2014 report, he diagnosed her with cervicgia, a proximal cervical disc, and a herniated disc due to the November 13, 2013 employment incident. Dr. Beard stated that the muscles and disc of the neck became stressed when appellant looked up at a supervisor while bent over at the waist. He too did not explain how the act of bending over and looking up caused or contributed to the diagnosed cervical conditions. Dr. Beard's general statement that appellant's neck muscles and disc became stressed is not rationalized.<sup>13</sup> His February 5, 2014 report stated that she had significant cervicothoracic junction tenderness and myofascial dysfunction due to the November 13, 2013 employment incident it did not provide any rationale for this opinion. The Board has held that medical conclusions unsupported by rationale are of diminished probative value and insufficient to establish causal relationship.<sup>14</sup> While Dr. Beard's remaining report

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<sup>9</sup> *Lourdes Harris*, 45 ECAB 545 (1994); *see Walter D. Morehead*, 31 ECAB 188 (1979).

<sup>10</sup> *Kathryn Haggerty*, 45 ECAB 383, 389 (1994).

<sup>11</sup> *Robert Broome*, 55 ECAB 339 (2004).

<sup>12</sup> *A.D.*, 58 ECAB 159 (2006); *Jaja K. Asaramo*, 55 ECAB 200 (2004); *Willie M. Miller*, 53 ECAB 697 (2002); *Michael E. Smith*, 50 ECAB 313 (1999).

<sup>13</sup> *Supra* note 11.

<sup>14</sup> *See Albert C. Brown*, 52 ECAB 152 (2000).

dated December 19, 2013 found that appellant had cervicothoracic junction pain, he did not state that this condition was caused or aggravated by the accepted work incident.<sup>15</sup>

The November 18, 2013 note from Ms. Taylor, a nurse practitioner, has no probative value in establishing appellant's claim because the Board has held that a nurse practitioner is not considered a physician as defined under FECA.<sup>16</sup>

The unsigned December 19, 2013 reports and order sheet from Campbell Clinic and February 21, 2014 clinical summary are insufficient to establish appellant's claim. A report that is unsigned or bears an illegible signature lacks proper identification and cannot be considered probative medical evidence.<sup>17</sup>

On appeal, appellant contended that she provided all elements of her claim. She stated that the additional statements from her physicians provided the requested factual information, but were not noted by OWCP. Appellant further stated that she provided a consistent history of her work-related neck injury. A review of the record reveals that medical reports from her physicians were in the case record at the time of OWCP's decision denying her traumatic injury claim. There is no evidence that it failed to properly review the case record.

Also, on appeal appellant submitted new evidence. However, the Board has no jurisdiction to review this evidence for the first time on appeal.<sup>18</sup> Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

### **LEGAL PRECEDENT -- ISSUE 2**

To require OWCP to reopen a case for merit review under section 8128 of FECA,<sup>19</sup> OWCP's regulations provide that a claimant must: (1) show that OWCP erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by OWCP; or (3) constitute relevant and pertinent new evidence not previously considered by OWCP.<sup>20</sup> To be entitled to a merit review of OWCP's decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.<sup>21</sup> Section 10.608(b) of the implementing regulations state that any

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<sup>15</sup> See cases, cited *supra* note 12.

<sup>16</sup> A.C., Docket No. 08-1453 (issued November 18, 2008). Under FECA, a physician includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by State law. 5 U.S.C. § 8101(2).

<sup>17</sup> *Thomas L. Agee*, 56 ECAB 465 (2005); *Richard F. Williams*, 55 ECAB 343 (2004).

<sup>18</sup> See 20 C.F.R. § 501.2(c)(1); *M.B.*, Docket No. 09-176 (issued September 23, 2009); *J.T.*, 59 ECAB 293 (2008); *G.G.*, 58 ECAB 389 (2007); *Donald R. Gervasi*, 57 ECAB 281 (2005); *Rosemary A. Kayes*, 54 ECAB 373 (2003).

<sup>19</sup> 5 U.S.C. §§ 8101-8193. Under section 8128 of FECA, the Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application. 5 U.S.C. § 8128(a).

<sup>20</sup> 20 C.F.R. § 10.606(b)(3).

<sup>21</sup> *Id.* at § 10.607(a).

application for review that does not meet at least one of the requirements listed in 20 C.F.R. § 10.606(b)(3) will be denied by OWCP without review of the merits of the claim.<sup>22</sup>

### **ANALYSIS -- ISSUE 2**

On August 25, 2014 appellant disagreed with the hearing representative's August 13, 2014 decision, which found that she failed to establish that her neck condition was caused by the accepted November 13, 2013 employment incident. She requested reconsideration. The underlying issue on reconsideration is medical in nature.

The Board finds that appellant did not show that OWCP erroneously applied or interpreted a specific point of law. Moreover, appellant did not advance a relevant legal argument not previously considered. In an August 25, 2014 request for reconsideration, she cited cases from New Hampshire's appellate court to support her contentions. The court cases cited by appellant are not relevant in determining whether she sustained a compensable neck injury because the findings of a state court are not binding with the Board.<sup>23</sup>

Appellant has not submitted any pertinent new and relevant medical evidence to support a causal relationship between her diagnosed neck condition and the accepted November 13, 2013 employment incident.

The Board finds that appellant did not meet the requirements of 20 C.F.R. § 10.606(b)(3). Appellant did not show that OWCP erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously considered by OWCP or constitute relevant and pertinent new evidence not previously considered by OWCP. Pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.

### **CONCLUSION**

The Board finds that appellant has not met her burden of proof to establish that she sustained a neck injury on November 13, 2013 while in the performance of duty. The Board further finds that OWCP properly denied appellant's request for further merit review of her claim pursuant to 5 U.S.C § 8128(a).

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<sup>22</sup> *Id.* at § 10.608(b); *see also Norman W. Hanson*, 45 ECAB 430 (1994).

<sup>23</sup> 5 U.S.C. § 8128(b); *see also D.I.*, 59 ECAB 158 (2007); *J.F.*, 59 ECAB 331 (2008).

**ORDER**

**IT IS HEREBY ORDERED THAT** the September 11 and August 13, 2014 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: May 1, 2015  
Washington, DC

Christopher J. Godfrey, Chief Judge  
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge  
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge  
Employees' Compensation Appeals Board